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No. 87-1540

In The
Supreme Court of the United States
October Term, 1987

VERNON McKINSEY, LLOYD FERREE, ROBERT CHRONISTER, RUTH MARSHALL AND FRANKLIN HENRY, ALL INDIVIDUALLY AND AS ELECTED OFFICIALS,

Petitioners,

v.

WILLIAM C. DONIVAN, BRADLEY J. GOHN, KENNETH L. ADAMS AND RICHARD K. TROUT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether Borough Council members may invoke absolute legislative immunity when they abolish a police department by voice vote and not by preparing, advertising and voting upon a written ordinance where state law expressly provides: "*The legislative powers of Boroughs . . . shall be exercised by or be based upon an ordinance.* All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided." Act of February 1, 1966, P.L. No. 851, 1006; 53 P.S. § 46006(3). (Emphasis added)

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STATEMENT OF THE CASE

On August 27, 1985, police officers employed by the Borough of Dallastown invoked the mandatory arbitration procedures established by state law to solve the impasse caused by the inability of the Borough and the police to agree upon a labor contract.

Following the demand for arbitration, the Borough, on September 9, 1985, voted on and purported to accept an agreement which contained different terms than those offered by the police. The police would not accept the contract.

When negotiations were resumed on September 16, 1985, the police requested additional benefits different from those requested at the last negotiating session. The Borough officials felt the police "were selling them short and were acting in bad faith."

The labor negotiations were complicated by three (3) factors.

The first factor was a desire on the part of two (2) Borough Council members to get rid of Chief of Police Donivan (a member of the bargaining unit) because "He had too much power" and because the Chief had testified against the Borough in a civil rights action involving the death of two (2) Borough employees.

The second complicating factor was the avowed position of the Borough officials that "If the police exercise their right to seek arbitration, then the police department would be abolished and a neighboring township would be contacted to provide police protection for the Borough of Dallastown."

The last factor was that both the Chief of Police and another Borough police officer testified against the Borough of Dallastown in a second civil rights action during the end of the bargaining period. Their testimony contributed to a jury verdict of $372,000.00 that was returned against the Borough of Dallastown on October 25, 1985.

The jury verdict ignited the increasingly volatile situation.

Following the jury verdict of October 25, 1985, the police, realizing that their jobs were to be abolished, notified the Borough of their desire to accept the last contract offer of the Borough and to withdraw the arbitration request.

The Borough Council refused to accept the contract offer and abolished the police department on December 9, 1985.

No Ordinance was drafted, advertised or adopted in the abolition of the police department.

The Borough officials did not provide the police officers with a hearing prior to the termination of their employment.

The police officers commenced suit against the Borough, the former Mayor and the members of the Borough Council seeking damages based upon various state law claims and federal civil rights violations.

The Borough Council members defend their actions on the basis of absolute legislative immunity.

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SUMMARY OF ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH PRINCIPLES ESTABLISHED BY THE UNITED STATES SUPREME COURT OR OTHER FEDERAL COURTS

1. The Court of Appeals recognized that local officials to be acting in the "legitimate scope of legislative activities" and thereby entitled to absolute immunity must comply with the Pennsylvania Enabling Act. The Act requires the legislative powers of Boroughs to be exercised by or be based upon an Ordinance.

A simple voice vote on a matter brought before a Borough does not constitute "legitimate legislative activity."

The Pennsylvania Ordinance procedure exists for a valid purpose. It gives notice to the community of the effect of impending legislative activity. It also assures that the mayor can exercise a veto on the legislation which is an important part of the "checks and balances" in the local scheme of government.

The "functional" approach argued by the Petitioner does not permit the immunization of activity "unlawful from the very beginning."

THE DECISION OF THE THIRD CIRCUIT PROVIDES FULL PRTECTION TO THE PUBLIC GOOD

By complying with the Pennsylvania statute which requires that legislative activity be based upon an Ordinance, local officials are given absolute immunity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). The decision of the Third Circuit Court of Appeals is in complete harmony with the other decisions of this Court by encouraging local officials to comply with law.

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ARGUMENT

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S APPLICATION OF FEDERAL LAW TO IMMUNITY QUESTIONS FOR FEDERAL DAMAGES CLAIMS.

1. The United States Third Circuit Court of Appeals did not create a conflict with this Court's "functional approach" to immunity law by improperly adopting state procedural law as argued by the Petitioner. On the contrary, the Court simply held that to be "acting legislatively" in Pennsylvania Borough Council members must follow the Pennsylvania law which requires all Boroughs when acting legislatively to prepare, advertise and vote upon an Ordinance.

Dallastown Borough, like all Boroughs in Pennsylvania, was formed under and is controlled by the Borough

Code which limits a Borough's legislative powers as follows:

> The *legislative powers of Boroughs . . . shall be exercised by or be based upon an Ordinance.* All other powers shall be exercised by vote of the majority of counsel present at a meeting, unless otherwise provided . . . Act of February 1, 1966, P.L. No. 581, 1006; 53 P.S. § 46006(3). (Emphasis added)

The Ordinance procedure requires publication of the text of the proposed Ordinance with advertisement at least seven (7) days prior to its adoption by the Council. In addition, the matter must be presented to the Mayor for approval. If the Mayor vetoes the Ordinance, a two-thirds vote of Council is necessary to enactment. Act of February 1, 1966, P.L. No. 581, 1006, 1007; 53 P.S. § 46006(1)-(4), 46007, as amended. A failure to follow the requisite procedures renders the enactment void for illegality. *Lancaster City Ordinance Case,* 383 Pa. 471, 119 A.2d 307 (1956).

The District Court found that no Ordinance was passed to disband the Dallastown police force and that the Borough Council merely voted on a motion to disband the police force. (See Petitioner's Appendix, p. 14A.)

Without an Ordinance there was no legislation for the Council to consider. The power exercised by the Council, whether considered to be administrative, proprietary, managerial, because of the absence of an Ordinance, was not legislative.

The District Court correctly held that the question of legislative immunity was controlled by *Abraham v. Peakarski,* 728 F.2d 167 (3rd Cir. 1984):

> In Pennsylvania, as in most states, municipal corporations are given by legislation a combination of proprietary, managerial and legislative powers. It is only with respect to the legislative powers delegated to them by the State Legislature that the members of governing Boards of municipal corporations enjoy legislative immunity. P. 174.

As further noted by the District Court, legislative immunity does not extend to legislatures for everything they do. Immunity only applies to legislative action taken in the sphere of "legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed.2d 1019, 71 S. Ct. 783 (1951).

It is submitted that in Pennsylvania the "legitimate sphere of legislative activity" requires a municipality to follow the state mandated procedure to be "acting legislatively."

Petitioners argues, however, that under the "functional" approach, both the District Court and the Court of Appeals were wrong in holding that under Pennsylvania law an Ordinance is necessary for the legitimate exercise of legislative powers.

The basis of absolute legislative immunity has from the beginning depended upon whether the person seeking such immunity was acting "in the sphere of legitimate legislative activity." No case cited by the Defendants or decided by any Federal Court has determined that illegitimate or unlawful activity can be the basis for absolute legislative immunity. This Court has specifically held that absolute legislative immunity only applies where officials are acting in a capacity "comparable to that of members of a state legislature." *Lake County Estate v. Tahoe*

Planning Agency, 440 U.S. 391, 406, 59 L.Ed.2d 401, 99 S. Ct. 1171 (1979).

Municipal corporations, unlike state legislatures, have limited legislative powers. They are permitted to exercise only those powers granted by the Legislature. Before a "functional" test should be applied in ascertaining the applicability of absolute immunity, it must be determined whether or not "the function" is within legal limits.

A municipal government cannot function beyond the powers granted it by the Legislature. Municipal legislation enacted by voice vote and without complying with the Ordinance procedure is a nullity.

To provide municipal officials with absolute legislative immunity in performing acts that are not permitted by Pennsylvania law facilitates no valid public purpose and is inconsistent with reasons for the "functional test" outlined by the Petitioners.

In *Forrester v. White,* 56 U.S.L.W. 4067 (1988), this Court has acknowledged that:

> Officials who seek exemptions from personal liability have the burden of showing that such an exemption is justified by overriding consideration of public policy . . . Even here, (discussing absolute immunity under the speech or rebate clause), however, the Court has been careful not to extend the scope of protection farther than its purposes require . . . *Id.* at 4068.

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1 While the question of whether absolute immunity extended to individuals acting in a legislative capacity at the purely local level was left open in *Lake County Estates,* such immunity was extended to local officials by the Third Circuit Court of Appeals in *Aitchison v. Raffiani,* 708 F.2d 96 (3rd Cir. 1983).

> Absolute immunity, however, is "strong medicine" justified only when the danger of [officials being] defected from the effective performance of their duties is very great. *Id.* at 4070.

The instant case is a perfect example of when absolute legislative immunity should not be granted.

There is no danger of municipal officials being deflected from the effective performance of their duties. They may legislate with complete impunity as long as they stay "within the law." As noted by the District Court:

> . . . If the Council had passed an Ordinance and conformed with all the necessary prerequisites, 53 P.S. §§ 46006, 46008, they would have been acting in a legislative capacity and would have been entitled to legislative immunity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983).

The Court of Appeals also observed:

> We dispute the Council members' argument that this decision represents a form over substance conclusion. The Ordinance procedure exists for a purpose. The publication requirement gives notice to the community of impending legislative activity and where, as here, the community will certainly be affected by the Council's actions, the rationale for publication is an important consideration. The Council members themselves have encouraged us to consider that their abolishment of the police force impacted the community in a permanent nature. This is one of the best reasons for requiring passage by an Ordinance and for the withholding of legislative immunity, if the proper procedures are not followed.
>
> Another aspect of the Ordinance procedure requiring comment is the veto by the Mayor willing to abolish the police force bypassed this requirement thereby overstepping the local scheme of "checks and bal-

ances." This activity represents a further departure from the sphere of legitimate legislative activity by the Council members.

The "functional" approach to absolute immunity should not immunize activity "unlawful from the very beginning." The opinion of the Court of Appeals is in harmony with this Court's prior decision on absolute legislative immunity.

2. The Court of Appeals' decision does not conflict with this Court's interpretation and application of 42 U.S.C. § 1988.

In this second argument, the Petitioners attempt to characterize the limited grant of legislative power by the Pennsylvania Legislature to Boroughs, as a "state procedural law", that conflicts with federal law.

It is submitted that the statute is a substantive limit on the legitimate sphere of legislative activity on the municipal level. There is nothing inconsistent with the Constitution, and laws of the United States (*Bernett v. Jaratten*, 468 U.S. 42, 47, 48, 82 L.Ed.2d 36, 104 S.Ct. 2924 (1984) (cited by the Petitioners) to mandate a procedure requisite for the valid exercise of legislative power by a local government.

The three (3) step process set forth in 42 U.S.C. § 1988 is unaffected. Federal law is not affected. Full and absolute legislative immunity is recognized in Pennsylvania. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). The state law simply limits the legislative powers of municipal corporations and designs the "sphere of legitimate legislative activity."

B. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEALS.

The Petitioners argument that the Third Circuit decision is in direct conflict with decisions of other Circuit Courts is simply not true.

The Petitioners' argument that the Pennsylvania state "procedural requirements" for Boroughs somehow limit federal immunity law is novel, but unsupported by either relevant precedent or logic.

A Borough official may not exercise any legislative power unless it is pursuant to the adoption of an Ordinance. The Act limits the legislative power granted to Boroughs:

> The *legislative powers of Boroughs . . . shall be exercised by or be based upon an Ordinance.* All other powers shall be exercised by vote of the majority of counsel present at a meeting, unless otherwise provided . . . Act of February 1, 1966, P.L. No. 581, 1006; 53 P.S. § 46006(3). (Emphasis added)

No federal case has ruled that such a limitation of power granted to municipal corporations is either unreasonable or unlawful.

Petitioners' argument suggests that a state legislature must delegate or be held to have delegated full legislative powers to a municipal corporation otherwise Federal Immunity law is violated.

This argument overlooks the reason for rule. Absolute immunity only applies when it serves the public

good. *Tenney v. Brandhove,* 341 U.S. 367, 64 L.Ed.2d 237, 71 S. Ct. 783 (1951). Forcing state legislatures to abrogate their role as the supreme source of state law and forcing them to delegate unlimited power to municipal corporations so that under federal law local officials who have violated the limits of their delegated powers will have absolute immunity, does not serve the public good. Such a result encourages wrongful doing and is inconsistent with the guidelines set down by this Court in *Forrester v. White,* 56 U.S.L.W. 4062 (1988).

C. THE DECISION OF THE THIRD CIRCUIT PROVIDES FULL PROTECTION TO THE PUBLIC GOOD.

In its final argument, Petitioners claim that this case is of imperative importance to the public because it deals with the need to protect the public good.

In support of its argument that the opinion of the Third Circuit Court of Appeals does not promote the public good, it cites the case of *Forrester v. White,* 56 U.S.L.W. 4062 (1988), as follows:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when governmental officials are exposed to liability for damages. *To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay the victims when they do not, it accomplishes exactly what it should* . . . . P. 4068 (Emphasis added)

Petitioners seem to ignore the specific language in *Forrester* which establishes when immunity should not be

recognized. While it is true that many municipalities, including all those in Pennsylvania and those in New Jersey, do have limited grants of legislative power, these powers, when lawfully exercised, provide absolute legislative immunity to the local officials. The instant opinion of the Third Circuit Court of Appeals not only protects the public good by recognizing that absolute immunity when exercised "in the sphere of legitimate legislative activity," it also assures that local officials are encouraged to carry out their duties in a lawful and appropriate manner.

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CONCLUSION

Both the United States District Court and the United States Court of Appeals for the Third Circuit recognized the need to deny the Borough officials absolute immunity in this case.

The extraordinary method used by the officials in abolishing the police department was borne of animosity and nurtured by a personal desire to retaliate for lawful conduct by the police employees that was wrongfully perceived to be improper. Legislative power was wielded arbitrarily and in violation of the "checks and balances" established for local government.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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